



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Review of the Balance of Competences between the United Kingdom and the European Union

Citation for published version:

Lock, T 2014 'Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights' Edinburgh Law School Working Papers, no. 2014/02, University of Edinburgh, School of Law, Working Papers. <https://doi.org/10.2139/ssrn.2378220>

Digital Object Identifier (DOI):

[10.2139/ssrn.2378220](https://doi.org/10.2139/ssrn.2378220)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Publisher Rights Statement:

© Lock, T. (2014). Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights. (Edinburgh Law School Working Papers; 2014/02). University of Edinburgh, School of Law, Working Papers. 10.2139/ssrn.2378220

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



University of Edinburgh

School of Law

Research Paper Series No 2014/02

Europa Working Paper No 2014/02

Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights

Dr Tobias Lock

Lecturer University of Edinburgh, School of Law

tobias.lock@ed.ac.uk



This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series

© 2014 Tobias Lock

Edinburgh School of Law Research Paper Series
University of Edinburgh

Abstract:

This is a submission to the United Kingdom's Balance of Competence Review on EU fundamental rights. It provides answers to a catalogue of questions compiled by the Ministry of Justice. The questions revolve around the impact (application) of the EU Charter of Fundamental Rights in the United Kingdom, in particular the UK's "opt-out" of the Charter and the case law by domestic courts on the Charter so far. It also discusses the differences in the fundamental rights protection provided by the Charter and by the HRA 1998 and the indirect effects the Charter has on the UK legal order. In addition, a short answer is provided to a question concerning the EU's accession to the ECHR. Furthermore, the submission highlights some legal and cultural challenges for the application of the Charter in the UK.

Keywords: EU Charter of Fundamental Rights; Scope of EU Law; Protocol No. 30; HRA 1998; UK Case Law

Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights

Submission by Dr Tobias Lock, Edinburgh Law School¹

This submission is limited to the legal framework for the protection of fundamental rights in the EU. It thus provides answers to questions 1, 2, 3, 9, 11, 13, 14 only.

1. What evidence is there that the impact of:

- the Charter of Fundamental Rights of the European Union (“the Charter”);**
- the EU’s broader framework of fundamental rights**

has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

The legal framework for the operation of the Charter

The impact of the Charter is limited to acts and omissions, which come within its scope. Article 51 (1) CFR has two prongs: (1) the Charter is always binding on the European Union; (2) it is binding on the Member States only when they are implementing Union law. As regards the first prong, the Charter can be considered advantageous for individuals and businesses in the UK, in particular because there is evidence in case law that the Court of Justice of the European Union (CJEU) has used its power to strike down EU legislation, which is incompatible with the fundamental rights guaranteed by the Charter.² Moreover, in a very recent decision the Court considered the length of proceedings in a case before the EU’s General Court excessive and in contravention to the right to have a case dealt with in a reasonable time guaranteed in Article 47 (2) CFR. The Court mentioned that such a violation could form the basis for a damages action based on Article 340 TFEU.³ Here the Charter opened up a route for the company concerned to claim damages.⁴

The scope of application of the Charter is more complicated where Member State action is concerned. This is because the Charter can only be invoked before UK courts where a Member State is ‘implementing Union law’.⁵ The existence of this trigger test reveals much about the nature of the Charter for the UK’s legal order in that it cannot be considered a replacement for generally

¹ The author would like to express his gratitude to Professor Niamh Nic Shuibhne and Dr Robert Lane of Edinburgh Law School for their invaluable help. Contact details: School of Law, University of Edinburgh, Law Annexe, 15 Buccleuch Place, Edinburgh EH8 9LN, tobias.lock@ed.ac.uk.

² E.g. in Joined Cases C-92/09 and 93/09 *Volker and Markus Schecke GbR v Bundesanstalt für Landwirtschaft und Ernährung* [2010] ECR I-11063 and in Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773; see also the Opinion by AG Cruz Villalón in Case C-293/12 *Digital Rights Ireland*, 12 December 2013, in which he recommended that Directive 2006/24/EC be declared incompatible (and void) with the Charter.

³ Joined Cases C-40/12 P, C-50/12 P and 58/12 P [2013] ECR I-0000.

⁴ It should be noted that the damages claim will only succeed if the company can show a ‘sufficiently serious breach’, cf. Case C-352/98 P *Bergaderm* [2000] ECR I-5291.

⁵ Note the different language versions: ‘lorqu’ils mettent en œuvre’ (French; literally, ‘when they are putting into work’) and ‘bei der Durchführung des Rechts der Union’ (German; literally, ‘during the execution of the law of the Union’).

applicable human rights guarantees such as those contained in the HRA 1998. It would thus be wrong to consider the Charter as a new bill of rights for the United Kingdom as its effects are limited. This limited applicability of the Charter was well captured by Elias LJ in the Court of Appeal:

If the *Zambrano*⁶ principle [i.e. EU law] is applicable, then Article 7 of the European Charter on Fundamental Rights is engaged. If not, EU law is not engaged and the proportionality assessment has to be made, as it was in each of these cases, solely by reference to Article 8 of the European Convention on Human Rights.⁷

Thus the judge made it clear that the court would first have to establish whether the case was concerned with EU law, in which case the applicant could rely on Charter rights. The Court then found that this was not so given the purely internal character of the situation. Hence the applicant could 'only' rely on Article 8 of the European Convention on Human Rights, which is cognisable in the UK courts by virtue of the HRA 1998.

The exact meaning of 'implementing Union law' is still not entirely clear.⁸ The explanations to the Charter, which must be given due regard when interpreting its provisions⁹, suggest that Member States are 'implementing Union law' when they act within the scope of EU law. This has been confirmed by the Court in the judgment in *Åkerberg Fransson*.¹⁰ In that case the Court adopted a relatively wide approach when it considered that provisions of Swedish law criminalising tax evasion could be considered such an implementation despite the fact that the provisions pre-dated Sweden's EU membership.¹¹ The reason for this was that Article 325 TFEU and VAT Directive 2006/112/EC place the Member States under an obligation to ensure collection of VAT and to prevent evasion.¹² The crucial question for whether the Charter grants rights to individuals, which they can enforce in the UK courts, is therefore whether the legal dispute at issue arises within the scope of EU law.

Effect of Protocol No 30: Opt-out or not?

It is appropriate at this point to clarify the legal effect of Protocol No 30 to the Lisbon Treaty, which some¹³ have considered to constitute an opt-out from the Charter for the UK and Poland. The Czech Republic was promised to be included in the Protocol at the next accession treaty.¹⁴ In this respect it is worthwhile pointing out the differing motivations that prompted the three countries to request the Protocol. The Polish motivation is reflected in Declaration No. 61 to the Lisbon Treaty, which states that:

⁶ Reference is made to Case C-34/09 *Zambrano* [2011] ECR I-1177 (on the rights of family members of EU citizens).

⁷ Elias LJ, *Damian Harrison (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 1736, para 2.

⁸ Cf. answer to Question 11.

⁹ Article 52 (7) CFR.

¹⁰ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* 2013 ECR I-0000.

¹¹ *Ibid.*

¹² *Ibid.*, para 25.

¹³ *Cranston, J.*, High Court, *R (on the application of Saeedi) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin), para 155; *Mostyn J.*, AB, *R (on the application of) v Secretary of State for the Home Department* [2013] EWHC 3453 (Admin), para 10.

¹⁴ This inclusion did not occur despite the fact that the accession treaty with Croatia was signed after the entry into force of the Treaty of Lisbon.

‘The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.’

The United Kingdom was mainly concerned with ensuring that Title IV of the Charter (the social chapter) would not interfere with Britain’s labour law.¹⁵ However, the Polish did not pursue this aim at all. This is clear from Declaration No. 62 to the Lisbon Treaty, which states:

‘Poland declares that, having regard to the tradition of social movement of ‘Solidarity’ and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.’

By contrast, the key concern for the Czech Republic is the preservation of the so-called Beneš decrees, which concerned the confiscation of property of people expelled from Czechoslovakia after the Second World War.¹⁶

Having presented the different, and partly diametrically opposed, motivations behind Protocol No. 30, the remaining paragraphs of this sub-section will discuss its effect. It is suggested that if the Protocol resulted in a complete opt-out from the Charter, this would have to be considered negative for the fundamental rights protection of individuals and businesses. However, the Protocol’s wording does not suggest that a complete opt-out was intended. It contains no amendment to the Charter in relation to Poland and the UK. Article 1 (1) of the Protocol states that:

The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

The Charter is thus considered to reaffirm the fundamental rights already in existence in European Union law at the time the Charter entered into force. Fundamental rights have been recognised to exist as general principles, i.e. EU primary law, since the late 1960s.¹⁷ Thus Article 1 (1) of Protocol No 30 makes it clear that the Charter cannot be used to introduce new fundamental rights into the Union’s legal order. This is also reflected in the preamble to the Charter, where it says that:

This Charter reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.

Hence, Article 1 (1) of the Protocol mirrors what is already the position set out in Article 51(2) CFR and Article 6 (1) TEU, namely that the Charter does not ‘extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers

¹⁵ Cf. Andrew Duff, MEP, Memorandum submitted to the House of Lords Select Committee on European Union, available at: <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/62/62wef11.htm>.

¹⁶ Cf. the Czech Republic’s own website: <http://www.czech.cz/en/Business/How-it-works-here/Justice,-legal-environment/The-Treaty-of-Lisbon-and-the-Czech-Republic>.

¹⁷ Case 29/69 *Stauder v Stadt Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

and tasks as defined in the Treaties.’ This view has been confirmed by the CJEU in *NS*.¹⁸ It is perhaps interesting to note that in the academic discussion, which had taken place before *NS* was handed down, no one maintained that the Protocol constituted a complete opt-out from the Charter.¹⁹ Hence it was did not come as a surprise that the Home Secretary in *NS* conceded that the Charter was applicable.²⁰

The meaning of Article 1 (2) of the Protocol, which refers to Title IV of the Charter, is less clear:

In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

The CJEU in *NS* did not address the question concerning its interpretation. On one view, it merely confirms what is already stated in Article 52 (5) CFR. This provision introduces a distinction between provisions that embody rights and provisions that contain principles. It states that principles first need to ‘be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers.’ Where such implementation has happened they ‘shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality’. This means that principles, in contrast to rights, cannot be relied on without their having been implemented first. Some would argue that Title IV of the Charter, with which Article 1 (2) of Protocol 30 is concerned, only contains principles and not rights. If this is so, then Article 1 (2) merely confirms that Title IV does not contain any rights.²¹

If this view is not shared, i.e. if one thought that Title IV contains some rights at least, one could conclude that the UK has achieved an opt-out from Title IV.²² Those rights would only apply as principles to the UK, i.e. they could only be invoked in judicial proceedings if first implemented at national level.

However, on a third possible view one could construe Article 1 (2) in a similar manner to Article 1 (1), i.e. based on the notion that the Charter merely affirms rights already extant as general principles. If this is so, then the wording of Article 1 (2) is an affirmation of the general position: the Charter does not *create* any new rights, which could be justiciable. If justiciable rights mirroring those in Title IV of the Charter are deemed to exist as general principles anyway, then Article 1 (2) would not constitute an opt-out.

Comparison between the HRA and the Charter: better protection?

An important question is in how far the Charter provides better fundamental rights protection to individuals and businesses in the UK than the domestic human rights regime. Under the HRA 1998

¹⁸ Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2011] ECR I-0000.

¹⁹ Cf. for instance C. Barnard, ‘The “Opt-Out” for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ in: Griller/Ziller (eds.), *The Lisbon Treaty*, Springer, 2008, 257-283; P. Craig, *The Lisbon Treaty*, OUP, 2010, 237-240; cf. also the views reflected in the House of Lords, EU Committee, *The Treaty of Lisbon: an impact Assessment*, HL Paper 62-I, paras. 5.84-5.111; as can be seen from the European Scrutiny Committee’s Third Report of 14 November 2007, that Committee, too, did not believe there to be an opt-out of the Charter.

²⁰ *N.S. v Secretary of State for the Home Department*, n. 18, para 46.

²¹ This seems to be the view of the House of Lords European Union Committee, summarised at para. 5.104 of HL Paper 62-I.

²² Barnard, n 19, 269.

the most a UK court can do in cases where it considers an Act of Parliament to be incompatible with the rights guaranteed in the ECHR is to issue a declaration of incompatibility, which leaves the validity of an Act of Parliament unaffected and does not change the outcome of the case. An exception to this applies under s. 29 of the Scotland Act 1998 as far as Acts of the Scottish Parliament are concerned. These are considered to be adopted *ultra vires* (and not law) if they contravene Convention rights or EU law. Moreover, only the higher courts have the competence to make declarations of incompatibility.²³

By contrast, if the Charter is applicable, Charter rights profit from the primacy of EU law.²⁴ This means that every court and tribunal, no matter how low in the judicial hierarchy, is under an obligation to disapply Acts of Parliament contravening Charter rights.²⁵ Given that many EU law related matters are first dealt with by tribunals, e.g. in employment law or in immigration law, the Charter results in an empowerment of these bodies.²⁶ It is important to note in this respect the difference between disapplying and declaring invalid. Disapplication does not render an Act of Parliament null and void. It remains in force and is applicable in cases where the Charter does not apply, i.e. situations not within the scope of EU law.

The relative power of the Charter became obvious in a recent decision by the EAT, in which the Tribunal considered that the State Immunity Act 1978 was incompatible with the applicants' right to an effective remedy guaranteed in Article 47 CFR.²⁷ The applicants were in an employment dispute with, their former employers, two embassies, which would normally profit from immunity in the UK courts. The judge considered that parts of the dispute came within the scope of EU law so that the Charter was applicable; so far as this was the case the State Immunity Act had to be dis-applied.

Moreover, it can be argued that the Charter, if applicable, provides much quicker relief for the victim of a human rights violation. In view of the requirement to exhaust domestic remedies before an individual can turn to Strasbourg and in view of the very lengthy duration of proceedings before the ECtHR, the road to Luxembourg can be travelled much more quickly if necessary. This is particularly so where a novel situation arises which deserves clarification since every court and tribunal in the United Kingdom has the right to request a preliminary ruling from the CJEU under Article 267 TFEU.

In addition, it should be briefly mentioned that the Charter contains a far wider array of rights than the ECHR/HRA. This is particularly true in the context of equality rights. Given that the UK has not signed up to Protocol No 12 to the ECHR, and given that Article 14 ECHR as a 'parasitic' right does not provide very far-reaching protection, in particular not in private law disputes, EU equality rights play a very important role in domestic law. In this sense the Charter can be regarded as an important addition to the protection of the rights of individuals in the UK. Moreover, some of the ECHR rights, which are duplicated by the Charter, have been modified and extended.²⁸

²³ S. 4 (5) HRA 1998.

²⁴ Case 6/64 *Costa v ENEL* [1964] ECR 585; accepted by the House of Lords in *Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2)* [1990] 3 WLR 818, [1991] 1 AC 603 HL.

²⁵ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

²⁶ Cf. answer to Question 14 for statistics on preliminary references by tribunals.

²⁷ *Benkharbouche v Embassy of the Republic of Sudan* (UKEAT/0401/12/GE) and *Janah v Libya* (UKEAT/0020/13/GE); an appeal against the decision in *Benkharbouche* is currently pending before the Court of Appeal (case no. 20133062).

²⁸ On this see the following discussion on the 'indirect' effects of the Charter.

The above discussion has shown that the Charter, *in so far as it is applicable*, in some situations provides better protection for individuals than the UK's domestic regime based on the HRA and the common law. In wholly internal situations, the Charter cannot be invoked and thus does not provide any protection.

Indirect effects of the Charter

Apart from its direct application, it is important to note that the Charter also has indirect effects on the interpretation of the ECHR. As already mentioned, many of the provisions in Chapters I and II of the Charter are based on equivalent provisions in the ECHR. Where the ECHR provisions were deemed outdated by the drafters of the Charter, they were updated. An illustrative example is the right to marry guaranteed in Article 9 CFR and Article 12 ECHR respectively. Whereas Article 12 ECHR restricts this right to 'men and women', which is traditionally interpreted to restrict the right to opposite sex couples, Article 9 CFR is worded more openly²⁹ and can potentially accommodate same-sex marriages. A further example is Article 6 (1) ECHR, which limits the right to a fair trial to civil and criminal cases, whereas Article 47 CFR does not contain such a limitation so that it could also apply in administrative law proceedings.

There is an increasing tendency on part of the European Court of Human Rights to refer to these 'updated' versions of certain ECHR rights in order to justify an evolutive interpretation of the ECHR. For instance in the case of *Goodwin v UK* the ECtHR *inter alia* noted that Article 9 CFR departed from the wording of Article 12 ECHR, and came to the conclusion that a post-operative transsexual had a right to marry under Article 12 ECHR.³⁰

Given that the UK courts generally follow the case law of the ECtHR,³¹ these indirect effects of the Charter can be felt in the United Kingdom's legal order even outside the Charter's scope of application. In this way the Charter further contributes to the protection of individuals and businesses from state interference.

2. What evidence is there on whether the Charter is being interpreted and applied in line with the general provisions set out in Title VII of the Charter?

Given that the Charter only applies in the Member States where the conditions set out in Article 51 (1) CFR are fulfilled, there is an increasing amount of case law dealing with this question. In this regard, it is important to note that while the Court adopted a wide approach in *Åkerberg Fransson*, there is equally evidence in recent case law on EU citizenship that the Court uses Article 51 (1) to allay the fears of the Member States with regard to the Charter's scope. For instance, in the case of *Dereci* the Court held that third country nationals, who apply for a right of residence in order to join their European Union citizen family members, who had never exercised their right to free movement and had always resided in the Member State of which they are nationals, could not rely on Citizenship Directive 2004/38.³² The Court then went on to point out

²⁹ Article 9 CFR reads: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.'

³⁰ *Goodwin v United Kingdom* app no 28957/95, ECHR 2002-VI, para 100; other examples include *Bayatyan v Armenia* [GC] app no 23459/03, ECHR 2011 with regard to the right to conscientious objection under Article 9 ECHR and 10 CFR; *Scoppola v Italy (no. 2)* [GC] app no 10249/03 (17 September 2009) with regard to whether a criminal court was obliged to apply a more lenient penalty retroactively under Article 7 ECHR and 49 CFR.

³¹ S. 2 HRA as interpreted in *Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant)* [2004] UKHL 26 (so-called mirror principle).

³² Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315.

'[...] that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'³³

This shows that the Court is not only conscious of the limited scope of the Charter but that it is also adamant to point out these limits to the national courts.

The CJEU is also making an increasing number of references to the Charter explanations, which under Article 52 (7) CFR must be given due regard.³⁴ The distinction between rights and principles contained in Article 52 (5) CFR will be addressed in the answer to question 11.

3. What evidence is there that the impact of ECHR case law, as it is given effect through the EU's fundamental rights framework, has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

It is at present not possible to provide evidence on this point in the strict sense as there still is not enough case law to allow one to give a meaningful answer. The following points therefore serve to illustrate the legal framework.

As previously mentioned, many of the rights contained in the Charter are based on rights contained in the ECHR. Article 52 (3) CFR provides that the meaning and scope of those rights must be the same as under the ECHR. The Court regularly refers to the ECHR and the ECtHR's case law when determining the substantive content of such a right.³⁵ Article 52 (3) confirms the previously existing practice of the CJEU to generally follow the case law of the Strasbourg court when developing EU fundamental rights derived from the general principles of EU law and transforms it into a binding obligation. The jurisprudence of the Strasbourg court is the first point of reference for the CJEU and thus its most important source of inspiration.

It is, however, important to note that all courts and tribunals applying the Charter have the option of providing stronger protection to the victim of a violation. Thus while it cannot be said that this has been advantageous to individuals in the UK, one can safely say that entrenching the ECHR as a minimum standard for the interpretation of corresponding Charter rights is not disadvantageous to individuals or businesses.

9. What evidence is there that the impact of the EU's accession to the ECHR will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

In order to answer this question it is worth distinguishing between two questions: (1) will accession have an impact on the protection of individuals or businesses against UK public authorities?; and (2) will accession have an impact on the protection of individuals or businesses against the EU and EU acts?

³³ Ibid, para 71.

³⁴ Case C-597/12 RX-II *European Commission v Strack* [2013] ECR I-0000; Case C-334/12 RX-II *Jaramillo and Others v EIB* [2013] ECR I-0000; Case C-101/12 *Schaible* [2013] ECR I-0000; Case C-426/11 *Almero Herron and Others* [2013] ECR I-0000; Case C-283/11 *Sky Österreich* [2013] ECR I-0000; Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-0000.

³⁵ E.g. in Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Eifert* [2010] ECR I-11063; Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft* [2010] ECR I-13849; *Åklagaren v Hans Åkerberg Fransson* n. 10; Case C-400/10 *PPU McB v E* [2010] ECR I-08965.

As to the first question, there probably will be limited and indirect additional benefits to individuals and businesses when it comes to the assertion of their human rights within the UK and before UK courts. It is suggested that accession will not provide individuals with new remedies so that it will not directly be felt in the UK. The reason for this is two-fold. First, the HRA 1998 already incorporates the ECHR into domestic law so that individuals can rely on it. Second, while it is true that once acceded to by the EU, the ECHR becomes an 'integral part' of EU law and is capable of having direct effect and take primacy over conflicting national law³⁶, it is suggested that this would only be so where the UK is acting within the scope of EU law. Given that the Charter is applicable in the very same case and given that the ECHR constitutes the minimum standard of fundamental rights protection under the Charter (Article 52 (3) CFR), there is no additional benefit in such cases.³⁷

However, there are situations conceivable in which accession may be indirectly beneficial even in cases initiated in UK courts and tribunals. This would be situations in which the CJEU has adopted a standard of fundamental rights protection which is below that demanded by the ECHR. Because of Article 52 (3) CFR, discussed above, this is only likely to happen where there is no ECtHR case law on a given point.³⁸ Where a claimant then loses their case in the national court, which had relied on the CJEU's interpretation either with or without having made a request for a preliminary ruling, that claimant can take their case to the ECtHR in Strasbourg. The ECtHR can then review this lower CJEU standard. If, as suggested below, the *Bosphorus* presumption is given up, this would mean a full review of these findings and potentially an improvement of human rights standards in the EU.

Turning to the second question, one can identify two areas in which accession is likely to yield improved fundamental rights protection: the closure of the *Connolly* gap and a possible end to the *Bosphorus* presumption. As a background it should briefly be noted that individuals can already bring cases to the ECtHR which are founded on an alleged violation of the Convention brought about by EU action. Such cases have to be brought against the EU Member State, the authorities of which have acted vis-à-vis the victim.³⁹ However, there is a gap in this (indirect) protection where no Member State action has occurred, i.e. where *only* EU bodies were involved. This was made clear in the case of *Connolly*, which concerned a staff dispute between the EU and one of its employees.⁴⁰ It is suggested that EU accession will close the *Connolly* gap as it will become possible to bring such a case directly against the EU as respondent. Apart from staff disputes the other cases falling into this category are competition law cases, in which alleged procedural shortcomings before the European Commission and the EU courts may be at issue. In this sense, accession will immediately improve the fundamental rights protection of individuals and businesses in the UK.

As regards the *Bosphorus* presumption, the situation is a little less certain. The ECtHR established a presumption that a Member State which has no discretion in the implementation of an obligation under EU law has not violated Convention rights because the protection of fundamental rights at EU law is equivalent to what the Convention requires. This presumption can only be rebutted if the applicant can show a manifest deficit in the protection at EU level in the given case.⁴¹

³⁶ To this effect cf. Case 181/73 *Haegeman v Belgium* [1974] ECR 449.

³⁷ For a more detailed analysis, cf. Tobias Lock, 'End of an epic? The draft accession agreement on the EU's accession to the ECHR' (2012) 31 Yearbook of European Law 162, 190-194.

³⁸ For instance, this was the case in Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859 where the CJEU found that a company was not protected by Article 8 ECHR; a few years later the ECtHR decided in *Niemietz v Germany* app no 13710/88, Series A 251-B that this could very well be the case.

³⁹ *Matthews v United Kingdom* app no 24833/94, ECHR 1999-I.

⁴⁰ *Connolly v 15 Member States of the EU* app no 73274/01, 9 December 2009.

⁴¹ *Bosphorus v Ireland* app no 45036/98, ECHR 2005-VI.

This presumption puts EU Member States in a privileged position and places applicants in such cases at a serious disadvantage. In practice, the presumption has never been rebutted with regard to the EU.⁴² An open question is thus whether this presumption will continue to be applied after accession. Under Article 1 (4) of the Draft Accession Agreement⁴³, all action by Member State authorities will continue to be attributed to the Member State concerned even if it acted under strict EU obligations. Hence the same type of situation as in the *Bosphorus* case can arise after accession. The fate of the *Bosphorus* presumption is not addressed in the Draft Accession Agreement. It is, however, suggested that it is likely to be abandoned. In the first place, there are good reasons to assume that the presumption was introduced out of comity towards the EU system and in recognition of the fact that the EU was not formally bound by the ECHR.⁴⁴ In addition, the Draft Accession Agreement explicitly provides that the 'current control mechanism of the Convention should, as far as possible, be preserved and applied to the EU in the same way as to other High Contracting Parties, by making only those adaptations that are strictly necessary.'⁴⁵ Thus it is the aim of accession, as far as possible, to treat the EU like any other party to the Convention. Given that no other party enjoys the same or a similar privilege, it would only be logical for the Court to give up the presumption. Hence it is likely that the protection of individual rights in those types of cases will improve after accession.

Moreover, there may be indirect consequences, which may have an impact on the level of protection offered by the CJEU. Judges at the CJEU will be aware that their decisions will be susceptible to a challenge in Strasbourg. Thus it is possible that the CJEU will move to strengthen the human rights protection it offers and become more vigilant in the enforcement of such rights both vis-à-vis the EU and the Member States when implementing EU law.

11. What other future challenges and opportunities in respect of EU fundamental rights are relevant to the UK?

There are five future challenges one can identify with regard to EU fundamental rights. First, the exact boundaries of the scope of the Charter; second, the distinction between rights and principles; third, the potential for horizontal effect of Charter rights; fourth, the role of the general principles of EU law; and fifth, the determination of the substantive content of the rights in the Charter.

The first challenge relates to the exact boundaries of the scope of the Charter when it comes to its application in the Member States under Article 51 (1) CFR. While the decision in *Åkerberg Fransson* suggests a relatively broad approach, it is not entirely clear whether this approach will be continued.⁴⁶ A recent decision, in which the CJEU made references to *Åkerberg Fransson* would suggest this.⁴⁷ Here the Court referred to *Åkerberg Fransson* as the relevant precedent for the interpretation of Article 51 (1) CFR. At the same time, the German Federal Constitutional Court made it clear that it did not agree with an expansive reading of the *Åkerberg Fransson* decision. It said:

“[*Åkerberg Fransson*] must not be interpreted in a way which would lead to the conclusion that it constituted an *ultra vires* act or in a way which would endanger the protection by or

⁴² The ECtHR considered the presumption not applicable in a case concerning the United Nations sanctions regime, cf. *Al-Dulimi and Montana Management Inc. v Switzerland* app no 5809/08 (26 November 2013).

⁴³ 47+1(2013)008rev2.

⁴⁴ In *Michaud v France* app no 12323/11, ECHR 2012, para 104 the Court stated that the presumption is tailored to situations in which the 'international organisation [...] is not party to the Convention'.

⁴⁵ At para 7.

⁴⁶ *Åklagaren v Hans Åkerberg Fransson*, n. 10; the reasoning is briefly explained in the answer to Question 1.

⁴⁷ Case C-418/11 *Texdata* [2013] ECR I-0000.

enforcement of the Member State's fundamental rights, which would call into question the identity of the constitutional order erected by the Basic Law. In this sense the decision may not be understood and applied in a way that any reference of a provision to the abstract scope of Union law or purely factual effects on Union law would be sufficient for the Member States to be bound by the fundamental rights contained in the Charter of Fundamental Rights."⁴⁸

This stance is also relevant to the UK as it may well have an impact on the future development of the CJEU's case law. Implicit in this quote is the threat that the Federal Constitutional Court may consider a decision by the CJEU *ultra vires* and thus not applicable in Germany. Given that the Federal Constitutional Court considers itself to have jurisdiction to make such a finding, it is considered one of the most powerful antagonists of the CJEU. Its decisions carry particular weight in the discourse between the CJEU and national courts about the limits of European Union law. Its case law has in the past influenced the case law of highest courts in many other EU Member States. It is therefore likely that this *dictum* by the Federal Constitutional Court will trigger a response from the CJEU.

A further open question is the exact distinction between rights and principles established by Article 52 (5) CFR. The Court has not yet pronounced on this question. However, the opinions of the Court's Advocates General diverge on this point so that it is fair to conclude that there is a lack of clarity on this question.⁴⁹ This discussion will mainly concern the provisions contained in Chapter IV of the Charter. It has been suggested that in particular the provisions in Chapter IV contain principles.⁵⁰ This view, however, was dismissed by AG Trstenjak, who considered Articles 28 and 29 as well as 31 to contain rights rather than principles.⁵¹ It is recalled that the distinction between rights and principles is of great importance when assessing the effect of Article 1 (2) of Protocol No. 30.⁵²

Another future challenge concerns the question whether the rights contained in the Charter are capable of having horizontal effect. Moreover, the future role of the EU's fundamental rights as found in the (unwritten) general principles of EU law is not clear. Finally, the substantive content of many of the Charter rights has not yet been defined.

13. Is there any evidence of fundamental rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

It is suggested that the Charter (and EU accession to the ECHR) should primarily be regarded as ways in which the power of the EU is limited.⁵³ This is overall advantageous to individuals, businesses and the public sector in the UK. As regards an extension of EU competence in the area of fundamental rights, the EU's Justice Commissioner Reding recently proposed to extend the scope of the Charter

⁴⁸ BVerfG *Antiterrordatei* 1 BvR 1215/07, para 91 (translation Tobias Lock).

⁴⁹ Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* [2012] ECR I-0000 (Opinion by AG Trstenjak); Case C-176/12 *AMS* (Opinion by AG Cruz Villalón)

⁵⁰ Lord Goldsmith, 'The Charter of Rights – a brake not an accelerator' [2004] *European Human Rights Law Review* 473, 476.

⁵¹ Opinion by AG Trstenjak, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, n. 49, para 75-79.

⁵² For this discussion, see the answer to Question 1.

⁵³ Cf. the cases quoted in n 2.

to all Member State action.⁵⁴ This would, however, necessitate treaty change, which would require the agreement of all Member States (incl. the UK).

There is no evidence of the Charter being used to expand the legislative competence of the Union. As regards more subtle ways of competence expansion, e.g. through case law, it is important to note that there still is not a great amount of case law available which could provide a firm basis for conclusions in this respect. In addition, there is the more general issue of drawing the line between the Court merely interpreting the Charter and the Court overstepping the boundaries and acting *ultra vires*. This is where the critique of the German Federal Constitutional Court cited above in the answer to Question 11 is to be situated. Apart from the above-mentioned decision in *Åkerberg Fransson*, the CJEU's decision in *Melloni* has attracted some criticism in this respect.⁵⁵

It may be appropriate in this context to briefly comment on whether the Charter created new rights or whether it merely affirmed rights which had already been in existence as 'general principles'. The Charter itself is quite clear in its preamble that it merely 'reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States [...]'. This seems to us to be broadly correct. Nonetheless, the codification of these rights in the Charter makes these rights more 'tangible' and accessible. This may well incentivise lawyers to rely on EU fundamental rights which had previously been only recognised as an unwritten, and thus somewhat contourless, general principle. There should thus in theory be an increase in cases in which EU fundamental rights are part of the parties' arguments. Consequently the Charter should be gaining greater prominence not only in the CJEU but also in the UK courts. In fact, a brief search on the legal research database 'Westlaw' revealed that between 1 January 2010 and 10 December 2013, i.e. roughly during the first four years of the Charter's existence as a binding source of law, the Charter was referred to in 139 cases before UK courts and tribunals. By comparison during the previous four year period from 1 January 2006 until 31 December 2009, the Charter was only mentioned in 18 UK cases.⁵⁶ This shows a surge in references to the Charter, which is unlikely to abate.

14. Is there any other evidence in the field of EU fundamental rights which is relevant to this review?

At this point it is appropriate to comment on two more general phenomena, which may provide some useful background for this review. The first relates to the legal culture in the UK and its attitude towards EU law in general and EU fundamental rights in particular. There appears to be a lack of familiarity with EU law in general and with the Charter in particular amongst practising lawyers, i.e. both counsel and judges. The comments by Judge Mostyn in the case of *AB* must be considered quite significant. They suggest that EU law is still considered as entirely distinct from domestic law and not, as would be appropriate, as part of the applicable law of the land. In addition, the case of *AB* suggests a lack of awareness both on part of the judge and on part of counsel that the crucial question with regard to the Charter is its applicability in the Member State legal orders according to Article 51 (1) CFR.⁵⁷ In *AB*, for instance, Article 51 (1) CFR is mentioned only once as part of a quotation. Apart from that, the provision was not considered by the judge. This suggests that there is perhaps a need for more legal training on part of the judiciary but also the legal professions on matters of EU law and in particular on the often very difficult task of delimiting the scope of EU law. In this context it should be pointed out that tribunals generally seem to be more

⁵⁴ Speech by Commissioner Reding, 4 September 2013, SPEECH/13/677.

⁵⁵ Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECR I-0000.

⁵⁶ Search for "Charter of Fundamental Rights" as free text in Westlaw (carried out 10 December 2013).

⁵⁷ See above.

accustomed to dealing with EU law sources and with EU fundamental rights than the higher courts. This is evidenced by the fact that the vast majority of all reference requests ever to come from the UK were made by tribunals.⁵⁸ This includes important reference requests in the field of fundamental rights which were made by tribunals.⁵⁹

In this context it is important to point out certain procedural restrictions, which may discourage counsel from invoking the Charter. These rules relate to the number of authorities to which counsel may refer in their notes of argument before the appeal courts in Scotland and England. Section 91 of the Court of Session's Practice notes and Section 29 of the Court of Appeal's Practice Direction 52C state that the bundle of authorities submitted to the court in preparation for the hearing should not 'contain (include) more than 10 authorities [...]'. The term 'authorities' is not defined, but is in practice construed to include legislative materials. Hence reference to the Charter of Fundamental Rights as such would count as one authority. Given that the Charter is relatively new and given that it can only be invoked where the case comes within the scope of EU law, an argument based on the Charter requires elaborate substantiation. Counsel cannot generally take it for granted that the court is fully familiar with the cases helpful in determining the scope of EU law or indeed with the CJEU's case law on the applicability and effect of EU law. Hence arguments based on the Charter are prone to be lengthy, complicated and in need of authoritative backup. In light of this, counsel may choose not to 'waste' a significant number of the 10 authorities to which they are allowed to refer on making a Charter-based point. Of course, it must be acknowledged that there is some flexibility built into the provision given its wording ('should'). Thus in a case which is exclusively based in EU law, the courts may be more lenient in practice and allow more authorities to be cited. However, regarding cases where the EU law angle is only secondary, which may often be the case with Charter-based arguments, the issue remains that counsel may choose not to raise that point for the reason referred to above. Hence these rules could significantly restrict the ability of counsel to invoke the Charter in practice.

The second comment concerns the general cultural climate surrounding the EU and human rights. The Leveson report has highlighted the issue of mis-reporting both on human rights and on EU issues:

9.53 Articles relating to the European Union, and Britain's role within it, accounted for a further category of story where parts of the press appeared to prioritise the title's agenda over factual accuracy. On Europe, Mr Campbell said:

"Several of our national daily titles – The Sun, The Express, The Star, The Mail, The Telegraph in particular – are broadly anti-European. At various times, readers of these and other newspapers may have read that 'Europe' or 'Brussels' or 'the EU superstate' has banned, or is intending to ban kilts, curries, mushy peas, paper rounds, Caerphilly cheese, charity shops, bulldogs, bent sausages and cucumbers, the British Army, lollipop ladies, British loaves, British made lavatories, the passport crest, lorry drivers who wear glasses, and many more. In addition, if the Eurosceptic press is to be believed, Britain is going to-be, forced to unite as a single country with France, Church schools are being forced to hire atheist teachers, Scotch

⁵⁸ As of 2012 courts and tribunals other than the Supreme Court/House of Lords and the Court of Appeal had made 434 out of a total of 547 UK references (since the UK's accession to the EU), cf. CJEU, Annual Report 2012, page 115.

⁵⁹ E.g. from the Immigration Appeal Tribunal in Case C-60/00 *Carpenter* [2002] ECR I-6279; from the Social Security Commissioner in Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703; from the Employment Tribunal South London in Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603; from the Upper Tribunal (Immigration and Asylum Chamber) in Case C-83/11 *Secretary of State for the Home Department v Rahman* [2012] ECR I-0000.

whisky is being-classified as an inflammable liquid, British soldiers must take orders in French, the price of chips is being raised by Brussels, Europe is insisting on one size fits all condoms, new laws are being proposed on how to climb a ladder, it will be a criminal offence to criticise Europe, Number 10 must fly the European flag, and finally, Europe is brainwashing our children with pro-European propaganda! Of the UK press and the European institutions – I speak as something of a Eurosceptic by Blairite standards – it is clear who does more brainwashing. Some of the examples, may appear trivial, comic even. But there is a serious point: that once some of our newspapers decide to campaign on a certain issue, they do so with scant regard for fact. These stories are written by reporters, rewritten by subs, and edited by editors who frankly must know them to be untrue. This goes beyond the fusion of news and comment, to the area of invention.”

9.54 Although Mr Campbell’s evidence may have been exaggerated for effect, there is certainly clear evidence of misreporting on European issues. Mr Campbell drew attention to a Daily Mail story claiming that “the EU” was going to ban grocers from selling eggs by the dozen, followed by a story that there had been a U-turn and the ban would no longer take place. The reality is that there had never been a ban proposed and the original story was based on a deliberate or careless misinterpretation of EU proposals. Full Fact drew attention to a number of further ‘anti-EU’ stories which misrepresented facts, including a Daily Express report on EU plans to ‘ban’ plastic shopping bags, when the reality was that a consultation had been launched to explore a variety of options, including a potential ban, for reducing waste from plastic bags.

9.55 The factual errors in the examples above are, in certain respects, trivial. But the cumulative impact can have serious consequences. Mr Blair explained that the misinformation published about Europe by some parts of the press made it difficult for him to adopt particular policies or achieve certain political ends in Europe that he might otherwise have done. He said:

“My distinction is between that and how you actually report the story as a piece of journalism. So if you take the issue to do with Europe, what I would say is that those papers who are Eurosceptic are perfectly entitled to be Eurosceptic. They’re perfectly entitled to highlight things in Europe that are wrong. What they shouldn’t do is, frankly, make up a whole lot of nonsense about Europe and dish that up to the readers, because that’s – I mean, how does the reader know that’s not correct?”

9.56 That, ultimately, is the foundation of the criticism made in this section: there can be no objection to agenda journalism (which necessarily involves the fusion of fact and comment), but that cannot trump a requirement to report stories accurately. Clause 1 of the Editors’ Code explicitly, and in my view rightly, recognises the right of a free press to be partisan; strong, even very strong, opinions can legitimately influence the choice of story, placement of story and angle from which a story is reported. But that must not lead to fabrication, or deliberate or careless misrepresentation of facts. Particularly in the context of reporting on issues of political interest, the press have a responsibility to ensure that the public are accurately informed so that they can engage in the democratic process. The evidence of inaccurate and misleading reporting on political issues is therefore of concern. The previous approach of the PCC to entertaining complaints only where they came from an affected individual may have allowed a degree of impunity in this area: in the context of misleading reporting on political issues, representative bodies are likely to be far better placed to monitor, and complain about, inaccuracies.

Articles relating to the European Union, and Britain's role within it, accounted for a further category of story where parts of the press appeared to prioritise the title's agenda over factual accuracy.⁶⁰

There is a danger that such mis-reporting leads to a (further) deterioration of the public's regard for the European Union and in particular the fundamental rights protection available under European Union law.⁶¹ This is worrying given that, as elaborated above, the rights contained in the Charter are overall beneficial for individuals, businesses and the public sector in the United Kingdom.

Edinburgh, January 2014

⁶⁰ Leveson LJ, An inquiry into the culture, practices and ethics of the press, Volume 2, paras 9.53-9.56.

⁶¹ Further evidence of mis-reporting can be found on the "Euro-myths" page hosted by the European Commission's representation in the UK: <http://ec.europa.eu/unitedkingdom/blog/>.